(3)

No. 04-489

IN THE

Supreme Court of the United States

BROWARD YACHTS INC., A FLORIDA CORPORATION,
Petitioner,

v.

THE VESSEL, KNOWN AS DESTINY HULL NO.104, ITS ENGINES, TACKLE, FURNITURE, APPAREL, GEAR, EQUIPMENT, AND ALL OTHER THINGS THEREUNTO APPERTAINING AND BELONGING, *IN REM*, AND SEAGROVE TRADING, INC., A DELAWARE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Eleventh Circuit's decision conflicts with at least two precedents from other Circuits broadly interpreting the definition of what constitutes a "vessel" for purposes of admiralty jurisdiction.

Respondent's Brief in Opposition to the Petition for Writ of Certiorari demonstrates why the Petition should be granted because it underscores the confusion among the Circuit Courts surrounding the definition of the term "vessel" as defined by 1 U.S.C. § 3, and the resulting application of admiralty jurisdiction.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM A NUMBER OF OTHER CIRCUIT COURTS OF APPEALS INTERPRETING 1 U.S.C. § 3.

A. The Court Can Grant the Petition Even though the Opinion Below Is Unpublished.

Respondent Seagrove Trading, Inc. ("Seagrove") first asserts that there are no "compelling reasons" for granting certiorari in this matter because the opinion below is unpublished. The fact that the opinion below is unpublished is not a basis for denying a petition for writ of certiorari. *See, e.g., Burlington Northern R. Co. v. Oklahoma Tax Com'n,* 481 U.S. 454, 460 (1987)(granting certiorari to review unpublished decision in order to resolve conflict between Circuits).

B. Seagrove's Reliance On Cases Interpreting Non-Maritime Vessel Construction Contracts Is Misplaced.

Seagrove next claims there is no conflict between Circuit decisions and no admiralty jurisdiction over Broward Yachts' maritime lien for vessel storage because the yacht was under construction. Broward Yachts never

has disputed the well-settled principle that a contract to construct a vessel is outside of admiralty jurisdiction. This principle, however, is not at issue here. The issue in this case is whether there is admiralty jurisdiction over a maritime lien for storing an uncompleted yacht when the uncompleted yacht already has traversed navigable waters and, therefore, satisfies the definition of "vessel" contained in 1 U.S.C. § 3, because it is a "watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

The cases cited by Seagrove uniformly involve claimants who were parties to contracts to construct a vessel.[1] The rationale for excluding these cases from admiralty jurisdiction is that *the future existence of the vessel is contingent upon the performance of the contract. See Hatteras of Lauderdale, Inc. v. Gemini Lady, 853 F.2d 848, 850 (11th Cir. 1988)(citing The Manhattan, 46 F. 797, 799-800 (D.Wash.1891).* Unlike the cases cited by Seagrove, however, Broward Yachts was not a party to the contract to construct the vessel. Instead, it simply provided vessel storage – which long has been regarded as a "traditional maritime activity" and the source of a valid maritime lien. *See, e.g., Sisson v. Ruby*, 497 U.S. 358 (1990). In short, the future existence of the yacht was not contingent upon Broward Yachts at all.

C. The Legal Status Of The Yacht Is Indistinguishable From The Vessels At Issue In *McCarthy* And *Burks*.

None of the cases cited by Seagrove discuss the interpretation of the statute upon which Broward Yachts' seeks this Court's certiorari jurisdiction, *i.e.*, 1 U.S.C. §3. Similarly, none of Seagrove's cases involve a

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[1] *See, e.g., East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *The Jack-O-Lantern et al v. Purdy*, 258 U.S. 96 (1922); *The Winnebago*, 205 U.S. 354 (1907); *Edwards v. Elliot*, 88 U.S. 532 (1874); *Roach & Dennis Long, et al. v. William Chapman & Others, et al.*, 63 U.S. 129 (1859); *People's Ferry Co. of Boston, et al. v. Joseph Beers, et al.*, 61 U.S. 393 (1857).

situation – such as the one at issue here – where the object in question has traversed navigable waters. Thus, Seagrove fails to credibly explain how the museum piece in *McCarthy v. the Bark Peking*, 716 F.2d 130 (2nd Cir. 1983) and the derelict barge in *Burks v. American River Transp. Co.*, 679 F.2d 69 (5th Cir. 1982) constituted "vessels" for purposes of 1 U.S.C. §3 because they were *capable of being towed in navigation*, but a 104-foot mega-yacht which *already has been towed in navigation* is not a "vessel."

Instead, Seagrove attempts to dismiss *McCarthy* and *Burks* on the grounds that these cases involve maritime torts as opposed to maritime contracts. This distinction is irrelevant. Broward Yachts relies on *McCarthy* and *Burks* for their reasoning that a derelict hull *capable of being towed in navigation* satisfies the definition of "vessel" under 1 U.S.C. § 3. The nature of the underlying actions in those cases has nothing to do with the vessel's status.

Seagrove next asserts that the objects at issue in *McCarthy* and *Burks* were "vessels" because they had been "launched and completed" based on this Court's test for assessing maritime construction contracts in *Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242 (1920). This distinction equally is meritless. Launching and completion were not issues in either *McCarthy* or *Burks*. The primary issue in *McCarthy* and *Burks* was that the objects were *capable of being towed in navigation*. For example, the Second Circuit in *McCarthy* held that a derelict museum piece incapable of navigating on its own and which had not been in the water for over half-a-century satisfied the definition of "vessel" under 1 U.S.C. § 3, because there was a "hypothetically plausible possibility" of it being used as a means of transportation over water. *McCarthy*, 716 F.2d at 134. The Fifth Circuit adopted an equally expansive interpretation of 1 U.S.C. § 3 in *Burks*, holding that an unpowered barge was a "vessel" and noting that even "three men in a tub" could constitute a vessel. *See Burks*, 679 F.2d at 75.

Seagrove's reliance on the "launched and completed" test is misplaced. In fact, even the cases on which Seagrove relies hold that the "launched and completed" test is limited to contracts concerning the construction and repair of a vessel:

> The *Francis McDonald* rule is merely a "boundary point" to be heeded in distinguishing a contract to construct a vessel from one to repair a vessel; "*completion" is not a universal test of vessel status applicable in whatever context admiralty jurisdiction may be questioned.* Thus, for example, a partially constructed casino boat may be a vessel for purposes of admiralty jurisdiction in tort even though it would not be a "completed" vessel for purposes of a breach of contract action by the builder. *Nor does the "launched and completed" test necessarily apply to any species of contract other than one to construct or repair a vessel.*

Hyundai Heavy Indus. Co., Ltd. v. M/V Saibos, FDS, 163 F.Supp.2d 1307, 1315 (N.D. Ala. 2001)(citations omitted, emphasis added).

Seagrove's seemingly black-and-white interpretation of admiralty jurisdiction is not supported by any authority. There are no cases holding that the "launched and completed" test applies to a third-party whose rights do not flow from a contract to construct a vessel. Accordingly, the "launched and completed" test simply has no application here, and the status of the yacht is legally indistinguishable from the vessels at issue is *McCarthy* and *Burks*.

D. Broward Yacht's Contract to Store the Yacht Cannot be Transformed into a Non-Maritime Construction Contract.

Lacking any support for the argument that the 1 U.S.C. § 3 does not apply, Seagrove next attempts to transform Broward Yachts' agreement to provide vessel storage into a vessel construction contract. In support of this novel argument, Seagrove relies on *Nilo Barge Line, Inc. v. M/V Bayou DuLarge*, 584 F.2d 841 (8th Cir. 1978) and *Boat La Sambra v. Lewis*, 321 F.2d 29 (9th Cir. 1963). As with the other cases cited by Seagrove, however, these cases simply stand for the well established proposition that a contract to construct a vessel is not maritime. In both of these cases, the claimants provided navigational or electronic components for a newly constructed vessel and sued to recover payment for providing the

equipment. Neither case concerns vessel storage, discusses 1 U.S.C. § 3 or addresses objects that had traversed navigable waters.[2]

Nevertheless, even if Seagrove's argument has merit – which is denied – the agreement to store the yacht cannot properly be considered to be a vessel construction contract. As seen above, the future existence of the yacht was not contingent upon Broward Yachts performance. The fallacyof Seagrove's argument is underscored by the fact that had Broward Yachts failed to perform its contractual obligations to store the vessel: (1) the yacht still would exist and (2) Seagrove would have no right to sue Broward Yachts for failing to complete construction of the yacht.

There is no credible dispute that the yacht traversed navigable waters and that it is a "watercraft or contrivance capable of being used as a means of transportation on water." Accordingly, the yacht satisfies the definition of "vessel" set forth in 1 U.S.C. § 3, and as that term has been applied by the Second and Fifth Circuits. Consequently, Certiorari should be granted to resolve the conflict between the Eleventh Circuit's decision and the decisions of the Second and Fifth Circuit interpreting 1 U.S.C. § 3.

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[2] Ironically, the Eleventh Circuit – from which this Petition arises – previously applied admiralty jurisdiction to uncompleted vessels that had traversed navigable waters. *See, e.g., Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht, Hull No. 01*, 625 F.2d 44, n.2 (5th Cir. 1980)(affirming -- in case decided before the Fifth Circuit split -- application of *in rem* admiralty jurisdiction to yacht that was not totally complete and which was out of the water when the action began because it had traversed navigable waters).

CONCLUSION

For the reasons discussed above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on behalf of Broward Yachts this 23 day of November 2004.

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